Supreme Court, U.S.
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No. 01-918

In the

Supreme Court of the United States

VENETIAN CASINO RESORT, L.L.C.,

Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a private business builds a private walkway on its privately owned land for a purpose expressly limited to pedestrian traffic, may a federal court—in conflict with the doctrine of the forum state's supreme court—declare the walkway an open-ended public forum, even to the extent of allowing throngs of protestors to occupy it as a staging ground for demonstrations against the business that built it and owns it?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus files this brief to assist in the consideration of important constitutional issues of property rights and expressive rights that are presented by this case. Pacific Legal Foundation (PLF) has an institutional commitment to a robust enforcement of both the Fifth and the First Amendments. For more than two decades PLF attorneys have been litigating in support of property rights as protected by the Fifth Amendment. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 835 (1987). Additionally, PLF attorneys have litigated to the highest levels in support of First Amendment rights. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1-(1990).

INTRODUCTION

May courts impose an unlimited public forum on a privately owned and maintained walkway, merely because the walkway is designed to serve pedestrian traffic and has the appearance of a traditional publicly owned sidewalk? The appeals court below answered in the affirmative, asserting that because the owners of the private walkway agreed to "unobstructed public use," the privately owned walkway assumes "the normal attributes of a *public* sidewalk." *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937, 943 (9th Cir. 2001) (emphasis added).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

To be sure, the court also noted that the privately owned pedestrian walkway in question, in front of the Venetian Casino Resort (the Venetian) along the Las Vegas Strip, was the successor to a publicly owned sidewalk that was uprooted when the Las Vegas Strip was widened. *Id.* at 944. But those particular facts are not the ultimate foundation of its ruling. Rather, the court issued a sweeping pronouncement that jeopardizes property rights on privately owned sidewalks no matter what their historical background: "Free speech is certainly incidental to pedestrian traffic," the court asserted, claiming that sidewalks "are the archetype of a public forum," (*id.* at 943 (citation omitted))–*apparently no matter who has title or what limits are placed on the invitation to the public.*

There is stark conflict between this ruling and the property-rights principles articulated by the Nevada Supreme Court when it issued a diametrically opposed opinion in a remarkably similar case. Nevada's highest court declared that *another stretch of privately owned walkway along the same street*—the sidewalk along the Las Vegas Strip, next to the Mirage Casino-Hotel—*is not a public forum.* The court declared that, even though the Mirage walkway is used by the general public for "sidewalk [] travel" (in the same way as the Venetian walkway)—*and even though the walkway might have been, like the Venetian walkway, a replacement for a publicly owned sidewalk*—there is no First Amendment right for pamphleteers to use it to hand out fliers promoting their business. *S.O.C., Inc. v. The Mirage Casino-Hotel*, 23 P.3d 243, 244-47 (Nev. 2001). The Court so ruled on the grounds that (1) the Mirage's walkway is privately owned (as is the Venetian's); and (2) the Mirage (again like the Venetian) has made it clear that it has opened its walkway to the public only for the limited purpose of pedestrian traffic. *Id.* So Nevada's highest court gave Fifth Amendment property rights a much

more robust application than the appellate court below was willing to do in a similar context, in the same zip code.

The case at hand involves more than abstract questions about expressive rights on private land. It has very concrete implications for every business thinking about building a sidewalk on its property to aid pedestrians. Can such a sidewalk be constructed without being conscripted as an unlimited public forum? Can the business that owns it be forced to let protestors use it to mount demonstrations aimed at blackening the company's name?

This Court has spoken definitively on these general issues. It has ruled that a business does not lose its property rights under the Fifth Amendment merely because it opens some of its property for a limited form of public use. It is well established in common law that property owners can explicitly or implicitly dedicate property for *limited* public uses without thereby opening the property to *unlimited* uses—and certainly without acceding to its being used as a staging ground for protests against the property owner.

This Court has also ruled that the First Amendment bars government from forcing a private party to provide a forum for a message not of the private party's choosing, at least not when the property owner's investment-backed expectations do not envision the property as a public forum.

The appellate court contradicts both of those teachings by ruling that protestors have a right to demonstrate on a private resort's privately owned walkway simply because the resort has opened the walkway as a pedestrian thoroughfare.

The rights of commercial property owners when confronted with claims that they must grant others the use of their property for expressive purposes is an important question

that has triggered litigation in many states. For all these reasons, this Court should grant the petition, in order to remind lower courts of the First and Fifth Amendment liberties that come with property ownership.

STATEMENT OF THE CASE

In order to accommodate increased traffic in the wake of the construction of the Venetian, Las Vegas Boulevard—the Las Vegas Strip—had to be widened. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F. Supp. 2d 1027, 1030. (D. Nev. 1999). The additional lane took up the entire public right-of-way, requiring that the publicly owned sidewalk be taken out, and leaving no space for a new sidewalk. *Id.* So the Venetian promised in an agreement with the Nevada Department of Transportation, which owned the public land at issue, to construct a walkway on its own private property, parallel to the street. *Id.* But it did so only after going to considerable lengths to ensure that the walkway would be legally acknowledged as its private property, and that its use would be constricted. Under a January 9, 1999, agreement between the Venetian and the Nevada Department of Transportation, the Venetian pledged to build a walkway on its private property for pedestrian use–*but the agreement specified that the Venetian retained ownership and control.* Specifically, the Venetian would enjoy "'full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution.'" The walkway was designated specifically for "pedestrian access," and nothing more. *Id.*

Despite the fact that the walkway was private property and the Venetian opened it only for a particular, limited use, the County issued a demonstration permit to protestors so that they could occupy the walkway for a demonstration against the

Venetian. *Id.* at 1031. The Venetian responded by putting up signs stating that the pedestrian walkway was private property. *Id.* When the unions ignored these signs and held a mass demonstration, Las Vegas police, after consulting the District Attorney, refused to arrest or cite any of the demonstrators for trespassing. *Id.*

The trial court denied Venetian's claim that the city's facilitation of the protests amounted to an unconstitutional taking of property, and the appellate court affirmed, stating that protests were permitted because the walkway is a "normal . . . public sidewalk." *Venetian*, 257 F.3d at 943.

REASONS FOR GRANTING THE PETITION

I

THE RULING BELOW CONFLICTS WITH THE TEACHING OF THIS COURT, AND OF NEVADA'S HIGHEST COURT, THAT PRIVATE PROPERTY DOES NOT BECOME AN UNLIMITED PUBLIC FORUM MERELY BECAUSE THE OWNER OFFERS LIMITED ACCESS TO THE PUBLIC

A. The Ruling Below Conflicts with This Court's Teaching That Property Owners Do Not Surrender All Property Rights by Allowing Public Access for a Specific Purpose

The ruling below is astonishingly sweeping in finding that a sidewalk, even though privately owned, is a public forum—merely because it has been opened to the public for a specified use as a pedestrian walkway. The court imposes a public forum so absolute that the property owner must even allow hostile demonstrators to use the walkway as a staging ground for protests against the owner.

Granted, the particular walkway in question is the successor of a publicly owned sidewalk along a parallel government right-of-way that has been torn up for street-widening. *Venetian*, 45 F. Supp. 2d at 1029-30.

However, the appellate court, in finding that anti-Venetian protestors have a First Amendment right to demonstrate on the Venetian's walkway, does not ultimately base its decision on the historical facts in a way that might confine the ruling to this particular case. Rather, the court makes a sweeping assertion that could transform into public forums all privately owned sidewalks that serve as pedestrian thoroughfares. Relying on *Frisby v. Schultz,* 487 U.S. 474, 480 (1988), the court asserts that because the Venetian walkway is a "thoroughfare sidewalk," the anti-Venetian protestors have First Amendment rights on it, as sidewalks are the "archetype of a traditional public forum." *Venetian,* 257 F.3d at 948.

The problem with using *Frisby* to impose an open-ended public forum on privately owned walkways is that *Frisby* dealt with picketing on a *publicly owned* street. 487 U.S. 474. The Venetian's walkway has been acknowledged to be *privately owned*, under an explicit agreement with the Nevada Department of Transportation. The Venetian secured this understanding as a condition to building the sidewalk in the first place, so this understanding was part of the Venetian's investment-backed expectation regarding its property rights and the nature of the walkway. *Venetian*, 257 F.3d at 950.

While the agreement did explicitly bind the Venetian to design the sidewalk "for the purpose of providing unobstructed pedestrian access" (*id.* at 949), the court below is wrong in reading this fact as warrant to declare the walkway an unlimited public forum. Allowing pedestrians to travel from one point to another on one's property is not an open-ended grant of public

access. Granting permission for people to walk about is not the same as granting permission for them to stop and shout. *In particular, it is not the same as dedicating a forum so broad that it can be used by protestors to stage demonstrations against the owner of the property itself.*

The very fact that the Venetian bargained for and received assurances that the property remained private—that the owner retained "full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution" (*id.* at 947),—indicates that whatever implicit dedication there might have been was a *limited* dedication. The court below has used the Venetian's limited grant of public access as an excuse to impose upon it a nearly unlimited obligation to open the walkway for expressive purposes. This imposition violates common law principles and the explicit teaching of this Court.

1. By Failing to Adhere to the Common-Law Principle That a Property Owner Can Open a Private Parcel for a *Limited Purpose*, the Ruling Below Creates a Conflict with the Supreme Court of Nevada

The appellate court below does not honor the principle that a property owner can open private property for particular public purposes without being forced to open it for *all* purposes. The court's conception of the question at stake shows no appreciation of such nuances, but presents, instead, an all-or-nothing proposition: "The issue before us is whether the sidewalk on private property that requires unobstructed pedestrian traffic is a public forum." *Id.* at 943.

Yet it is well-embedded in common law that rights in real property can be conveyed and acquired for strictly limited purposes, so that they do not extend beyond them. An implied

easement, for example, is "a creature of the common law" and does not extend to uses that would infringe the "use and enjoyment" of the property of the party who implicitly granted it. 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 23 (2000).

It can be inferred from traditional doctrines of easements and other rights-of-way that the Venetian did not make any dedication that would be broad enough to permit anti-Venetian protestors to use the walkway as a staging ground. For instance, a rule of tort law holds that, where sidewalks on private property are intended to facilitate pedestrian travel, activities unrelated to travel exceed the use of such property and subject the trespasser to liability. *S.O.C.*, 23 P.3d at 247 (citing *Restatement (Second) of Torts* § 192 (1981)).

Likewise, it is a rule of easements that there is a "duty of repair and maintenance to prevent unreasonable interference" with the servient estate, *Walsh v. United States*, 672 F.2d 746, 749 (9th Cir. 1982)—a doctrine that underscores the principle that uses of an easement or right-of-way are limited to activities that would not impair the easement grantor's estate. 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 23.

The foregoing principles are applicable, at least by analogy, to the case at hand. Interests in land can be conveyed in a calibrated way. The court below, however, refused to recognize the logical limits on the public use of the Venetian's privately owned walkway. By allowing anti-Venetian demonstrators onto the Venetian's property, the ruling causes "unreasonable interference" with the Venetian's business, impairing the grantor's estate. The court, in other words, *mandates* that the Venetian accept precisely the kind of misuse of a right-of-way on its property that traditional property-law principles *prohibit*.

In refusing to recognize that a grant of interest in property can be limited in scope, the ruling below conflicts with the highest court of Nevada. The court below declared the Venetian's walkway a public forum, even though title remains with the Venetian and an agreement with the state Department of Transportation recognized it as private. Yet further along Las Vegas Boulevard, a walkway also adjacent to the street, and built by the Mirage Casino-Hotel, has been recognized by the highest court of Nevada as the Mirage's private property—and *not* a public forum for expressive purposes. *S.O.C.* 23 P.3d at 245.

The Nevada Supreme Court upheld a preliminary injunction against commercial leafleters who came onto the Mirage's walkway without the Mirage's permission. *Id.* at 247. The court recognized that, while the walkway is used by the general public for "sidewalk travel"—and while the walkway might have been a replacement for earlier publicly owned sidewalks—the fact that it served as a right-of-way did not "convert private property to a public forum . . . ." *S.O.C.* 23 P.3d at 246. No public forum was established, because the easement was limited to pedestrian purposes and did not encompass expressive purposes. "The extent of an easement, like any other conveyance of rights in real property, is fixed by the language of the instrument granting the right." *Id.*

Whatever the classification of the right-of-way in the case at hand, the Venetian's agreement with the Nevada Department of Transportation specified and restricted it to "*pedestrian access*" (*Venetian*, 257 F.3d at 940, 942-43 (emphasis added)), so the limits are analogous to those on the Mirage walkway.

Because the court below did not show an appreciation for the limited nature of the Venetian's grant of access to the public, two diametrically opposed legal doctrines are being

applied on two different stretches of walkway along the same street in Las Vegas—one which honors property rights, and the other—the opinion below—which subverts them. This conflict can undermine confidence in the consistency and reasonableness of the legal system. The petition should be granted in order to replace this confusion with conformity.

2. The Decision Below Conflicts with This Court's Rulings That Have Clearly Recognized That Property Owners Can Limit the Nature and Scope of Access That They Offer the Public

The appellate court's designation of a privately owned and maintained walkway as a public forum conflicts not only with common law principle that property can be dedicated in limited ways without creating a public forum, but also with this Court's related teaching that "[property] does not lose its private character merely because the public is generally invited to use it for designated purposes." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Hence, "[T]here is no federal constitutional right to trespass." *Planned Parenthood Association of San Mateo County v. Operation Rescue of California*, 50 Cal. App. 4th 290, 300 (1996), *cert. den. sub nom. Cochran v. Planned Parenthood Association of San Mateo County*, 522 U.S. 811 (1997).

In *Pruneyard*, the court acknowledged that a public forum could be inferred from the layout of a sprawling shopping center. But even then, the extent of the public forum was limited by the property owner's "investment-backed expectations." *Pruneyard*, 447 U.S. at 83. For instance, the shopping center's owner would not have been creating a forum for activity that would "unreasonably impair the value or use" of the shopping center. *Id.* In the case at hand, the Venetian's investment-backed expectations when it built the walkway were

that, at most, it was opening a thoroughfare for pedestrians to walk from point A to point B. There could have been no reasonable expectation that it was dedicating an unlimited public forum when it took pains to negotiate language that confirmed its continued Fifth Amendment rights in the property. And certainly the Venetian's expectations would not have included the creation of a forum for anti-Venetian demonstrators.

If government wanted to ensure that First Amendment claims could be asserted against the Venetian walkway, it could have made the walkway public or quasi-public "by using its power of eminent domain for this 'public purpose;'" but "if it wants an easement . . . it must pay for it." *See Nollan v. California Coastal Commission*, 483 U.S. at 841-42. Neither state nor county officials, however, have exercised this power. To the contrary, not only is there no agreement reserving a public forum, there is an agreement denying anything but private ownership. *Venetian*, 257 F.3d at 950. The incursion of protestors is thus an incursion on *private property*. The court below contradicts this Court by failing to recognize that the Venetian's walkway could be opened for pedestrian purposes while not losing its fundamentally private character, and hence not being transformed into a public forum.

B. The Appellate Opinion Imposes a Taking on the Venetian, as Defined by the Test Reiterated in This Court's *Pruneyard* Ruling

This Court has said that when government compels a private property owner to give way to another party's expressive interests, three factors must be considered to determine whether a "taking" has occurred: the "character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard*, 447 U.S. at 83. (quoting *Kaiser Aetna v. United*

States, 444 U.S. 164, 175 (1979). Under that test, the opinion below imposes a taking on the Venetian. By compelling the Venetian to provide the walkway as a forum for anti-Venetian protestors, the opinion interferes with the Venetian's "investment-backed expectations;" the "economic impact" could be significant; and the "character of the governmental action" amounts to a physical invasion of the Venetian's property.

In building the walkway on its private property, the Venetian clearly had "investment-backed expectations" that it was granting only a pedestrian thoroughfare, that the public use would not extend beyond that purpose, and that the Venetian's rights in the property would be recognized. It did *not* have reason to expect that it was creating something that government would declare to be a public forum on which anti-Venetian demonstrators would have a "right" to stage protests. Its negotiation of an agreement with the government that acknowledged its "full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution," demonstrates the Venetian's expectation that it would retain ultimate control over the walkway. *Venetian*, 257 F.3d at 950. While many international landmarks—the Sphinx, the Eiffel Tower, the Statue of Liberty—have been recreated in Las Vegas, the Venetian had no reason to expect that in putting a walkway on private land it was building a reproduction of Hyde Park Corner.

Indeed, this Court's *Pruneyard* ruling would give the Venetian an expectation that, even if it had been dedicating the walkway as a limited public forum, such a dedication wouldn't require it to provide a forum for anti-Venetian demonstrators.

In *Pruneyard*, the Court made it clear that, while the shopping center's investment-backed expectations included the

creation of a public forum, they didn't include the creation of a forum for activities designed to harm the shopping center's business. The owners' expectations weren't interfered with by the incursion of a handful of students politely passing out pamphlets unrelated to the business of the shopping center. However, the court indicated that things would have been different—that the shopping center's property rights would have been infringed—if it had been subjected to an incursion that would "unreasonably impair the value or use" of its business. *Pruneyard*, 447 U.S. at 83.

Just as the *Pruneyard* owners could not have had a reasonable, investment-backed expectation that they were creating a forum for anti-Pruneyard demonstrators, so the Venetian could not have had a reasonable, investment-backed expectation that building a sidewalk on its private property would offer a forum for throngs of anti-Venetian demonstrators. (The protest that gave rise to this lawsuit included 1,300 anti-Venetian demonstrators. *Venetian*, 45 F. Supp. 2d 1027.) In forcing the Venetian to play host to such demonstrators, the court interferes with the Venetian's legitimate, investment-backed expectations and therefore imposes a taking, under the test laid out in *Pruneyard*. The test's other two prongs are also implicated: (1) an anti-Venetian demonstration harm's the property owner's economic interests; and (2) the "character of [a] governmental action" that imposes a horde of demonstrators on private property is especially suspect under this Court's precedents.

In the decision that first delineated the second of those two prongs, this Court noted that "a 'taking' may more readily be found when the interference with property *can be characterized as a physical invasion by government* . . . ." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)(emphasis added)(citation omitted).

The petition should be granted because the appellate ruling did not defer to the test reiterated in *Pruneyard* for determining whether a taking has occurred when expressive interests are pitted against property rights.

II

THE APPELLATE RULING CONFLICTS WITH THIS COURT'S RULINGS AGAINST COMPELLED SPEECH

Only a superficial analysis would categorize this case as one that pits Fifth Amendment rights against First Amendment rights. In fact, those constitutional provisions are in harmony as regards the facts here. They are in accord in protecting the Venetian from being forced to provide a forum on private property for protestors who would stage demonstrations against the Venetian.

This Court has recognized that freedom of speech is a nullity if government can force on a party a message that is not necessarily of the party's choosing. It is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). As noted above, the Venetian had an "investment-backed expectation" that the walkway would be private property incorporating the right to exclude. Yet the opinion below forces the Venetian's owners to play host on its private property to opinions manifestly not their own—indeed to protestors with an explicit anti-Venetian message. In condemning governmentally compelled speech, this Court has cited a famous statement by Thomas Jefferson: " '[T]o compel a man to furnish contributions . . . for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 n.31 (citation omitted) (1977). Because the opinion below departs

so dramatically from this principle, this Court should grant the petition.

III

THE ISSUES RAISED BY THIS CASE HAVE FAR-REACHING LEGAL AND POLICY IMPLICATIONS

At the center of this case are questions about whether and where private property interests must yield to claims of expressive rights. Scores of cases around the country in recent years have dealt with precisely this asserted conflict between free-speech interests and private-property rights. *See*, for instance, 13 such cases—with differing outcomes—listed at *S.O.C.*, 23 P.3d, 249 n.40. In addition, the California Supreme Court has in recent months accepted review of two cases in which signature-gatherers have asserted free speech rights against "big box" retail stores, claiming that their size and variety of products and services make them quasi-public fora. *See Young v. Raley's, Inc.*, 29 P.3d 795 (Cal. 2001), and *Waremart, Inc. v. Progressive Campaigns, Inc.*, 19 P.3d 1128 (Cal. 2001).

If uncertainty is allowed to prevail as to whether property rights must give way to other parties' claims of expressive interests, the policy implications could be significant and disturbing. Whatever the incentives might be for builders of resorts along Las Vegas Boulevard, developers of other commercial or office projects in other settings might be less inclined to include sidewalks in their plans, if they had reason to fear that sidewalks on private property are now to be declared places where people can stop and shout, and not just walk from point A to point B. Deterring developers from including sidewalks would frustrate the hopes of those urban planners who, following Jane Jacobs, author of "The Death and Life of Great American Cities," have argued that the "real assets of

neighborhoods . . .[are] diversity of use, human scale and *an active, pedestrian street life.*" Jacob Weisberg, *The Return of New York*, N.Y. Times, November 11, 2001, § 6, at 63 (emphasis added).

In order to prevent distortions in economic and development decisions that hinge on the stability of property law, and to provide guidance to lower courts on a property rights issue that is being widely litigated, this Court should grant the petition and review a ruling that makes property rights less predictable and less secure.

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to grant the petition.

DATED: January, 2002.

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